IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.567 OF 2006

Mahiboobi Mahiboob Tamboli ...Appellant

Versus

Shaberabi Mahiboob Tamboli & Ors. ...Respondents

Shri M.A.Utgikar for the Appellant.

Mrs Vijalaxmi Nikam for the Respondent No.1.

CORAM : ABHAY S.OKA, J.
DATED : JULY 27, 2007.

P.C.:

1. I have heard the submissions of the learned counsel appearing for the parties. The Second Appeal is preferred by the original Plaintiff. The Respondents are the original Defendants. The Appellant and the first Respondent are wives of deceased Mahiboob and the second Respondent is the daughter of the said Mahiboob from the first Respondent. The suit is filed by the Appellant for partition and separate possession of her one third share in respect of the suit properties. There is no dispute regarding the relationship between the parties. The dispute is as regards the shares. The trial Court partly decreed the suit by holding that the Appellant and the first Respondent have 1/16th share each and the second Respondent is having 7/8th share in the suit land and in the suit house. Accordingly, a

decree of the partition was passed both in respect of the suit land and the suit house. There is a confirmation of the same by the District Court in an Appeal preferred by the Appellant.

2. The submission of the learned counsel for the Appellant is that the courts below have completely misread the rule of Return (Radd). He submitted that considering the said rule after sharers are given their shares, the residue must go to the Appellant and the first Respondent and not to the second Respondent-daughter. He, therefore, submitted that the share granted to the daughter is certainly on the higher side as there was no reason for the courts below to deprive the Appellant and the first Respondent to the residue. He has invited my attention to the relevant provisions under the Hanafi Law of Inheritance.

3. I have considered the submissions. There are three classes of heirs (1) Sharers, (2) Residuaries and (3) Distant Kindred. The wives of the deceased and daughter of the deceased, both fall under the category of sharers. When there are more than one wives of the deceased, collectively, they are entitled to 1/8th share. When there is only one daughter, she gets one half share in the estate of the father. There is no

dispute about the entitlement to the said shares. Rule 66 in Chapter 7 of Mulla on Principles of Mohamedan Law (8th re-print of 19th edition) reads thus:

> **"66. Return (Radd.)**- If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return" or Radd.
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> . Exception.- Neither the husband nor the wife is entitled to the Return so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or the wife, as the case may be, by Return".

4. The Principle laid down is that if there is a residue left after satisfying the claims of sharers but there is no residuary, the residue reverts to the Sharers in the proportion of their shares. The explanation to the rule provides that neither the husband nor the wife is entitled to "Return" so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the

residue will go to the husband or the wife as the case may be. In the present case, the only dispute is regarding who is entitled to "Return". The exception makes it very clear that if there is any other heir apart from the husband or the wife, in such event neither the husband nor the wife of the deceased is entitled to "Return" and only if there are no other heirs, the residue will go to husband or the wife as the case may be. In the present case, the daughter is certainly a heir in the category of Sharers. Therefore, the widows of the deceased will not get any share in the residue and the residue will go to the daughter. That is the precise view taken by the courts below. Hence, no error can be found in determination of shares of the parties by the courts below. Accordingly, Second Appeal is dismissed with no orders as to costs.

JUDGE